NO. 05-19-00034-CR

IN THE
COURT OF APPEALS
FIFTH DISTRICT OF TEXAS

JUAN CARLOS FLORES **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE APPELLANT'S BRIEF

APPEALED FROM CAUSE NUMBER 069074 IN THE
15th DISTRICT COURT OF GRAYSON COUNTY, TEXAS

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STATEMENT OF THE CASE

Appellant, Juan Carlos Flores, was charged by indictment with Aggravated Robbery in Cause Number 069074, alleged to have occurred on or about September 4, 201 in Grayson County, Texas. (CR at 12).[1] Appellant pled not guilty. The jury found the appellant guilty. Punishment was assessed by the court at 15 years in Texas Department of Criminal Justice- Institutional Division. (CR at 101).

[1] Citations to the record are as follows: clerk's record (CR [Cause Number] at [page number]); reporter's record, ([Roman numeral volume number] RR at [page number]); supplemental reporter's record, ([Roman numeral volume number] SRR at [page number]); exhibits, (SX or DX [exhibit number]).

STATEMENT OF FACTS

1. The indictment

Paraphrased, the indictment in cause number 069074 alleges that on or about September 4, 2017 the Appellant, while in the course of committing theft of property and with the intent to obtain or maintain control of said property, intentionally or knowingly threatened or placed Nanu Shapakota in fear of imminent bodily injury or death, and the defendant did then and there use or exhibit a deadly weapon, a drill (CR at 12).

2. Pre-trial hearing

A hearing was held on the Appellant's Motions to Suppress on August 3, 2018. (III RR at 4). Detective **Kyle Mackay** ("Mackay") was the sole witness called at the hearing. Mackay was a detective with the Denison Police Department who was investigating a robbery that occurred on September 4, 2017. (III RR at 5). In the course of the investigation Mackay watched a video of the offense at which time he observed the item the victim had believed to be a gun appeared to be a drill covered with a sack. (III RR at 7).

Mackay testified the appellant became a suspect in the robbery after a tip was called into the police department. (III RR at 7). As part of the investigation Mackay went to the appellant's home on two separate occasions to speak to the appellant's wife and to attempt to speak to the appellant. (III RR at 8). One on of those occasions, after being asked several times by Mackay if the appellant was at home, the appellant's wife invited Mackay into the home to see if the appellant was present. (III RR at 8-9). It was

Mackay's belief he had consent to walk through the home for the purpose of looking for the appellant or anything involved with the crime or that "was in the scope of plain view." (III RR at 10-11). Mackay first observed a drill in what he believed to be the appellant's son's bedroom. He also observed a sack in the floor of the same bedroom and another sack in the floor of a closet that was standing open. (III RR at 11). Mackey believed it was possible those three items were involved in the robbery and he seized them from the residence. (III RR at 12). Once Mackay arrived back at the police department, he placed the sacks onto the drill for the purpose of comparison to the video of the offense. After placing the sacks on the drill, it appeared to Mackay it could be the same drill, but a "black object" would need to be placed over the drill for it to match. (III RR at 12).

Upon cross-examination by the State, after reiterating he observed the drill while walking through the house with the appellant's wife, Mackay stated he recognized the drill as potential evidence. He confirmed the same of the sacks. (III RR at 15).

3. Trial

Nanu Shapakota ("Shapakota") was the first witness called by the State at trial. At the time of the offense Shapakota and her husband owned a convenient store with a gas station. (IV RR at 123). On September 4, 2017 she was working at the store in place of her husband. (IV RR at 127). Around 8:30 on that date Shapakota was working in the back of the store when the doorbell rang and an individual ask her to come to the front of the store. She observed the person's face was covered and he was holding something "like" a gun in his hand. Shapakota became scared and walked to the front of the store.

(IV RR at 127). The individual told her she had one minute to give him all of the money that she had in the register. He put the bag on the counter and Shapakota grabbed all of the money from the register and put it in the bag. Per his request, she went to the restroom after he left. In the restroom she called the police. (IV RR at 128).

Shapakota believed the item in the individual's hand to be a gun until she looked at the video with the police. (IV RR at 128-129). Shapakota stated she felt that the individual would harm her if she did not comply. (IV RRR at 132). Upon cross-examination Shapakota confirmed the individual held the object and showed it to her like a gun, but did not strike at her with it or attempt to hit her. (IV RR at 137).

Sergeant **Brian Conrad** ("Conrad") with the Denison Police Department also testified for the State. He responded to the robbery at the convenience store on September 4, 2017. (IV RR at 142). When Conrad arrived, he observed the video of the incident. (IV RR at 143). Conrad also identified the suspect vehicle as a silver Chevrolet Tahoe. (IV RR at 144).

Maria Puente ("Puente") was also called by the State. Puente was at her cousin's house when she observed the video put out on social media by the police department. (IV RR at 163). After viewing the video Puente contacted law enforcement. (IV RR at 164). She believed the person on the video to be the appellant, Juan Flores. She based this on his clothing and his voice. Puente had lived in the appellant's home for 2 or 3 months during the summer of 2017. (IV RR at 165). She also recognized the suspect vehicle as one similar to what the appellant and his family possessed. (IV RR at 171).

Under cross-examination Puente testified she was living with the appellant and his

family because of an abusive situation at home. The fact Puente was living in the appellant's home created tension between her family and the appellant's family. (IV RR at 180). At one point there was a physical altercation between Puente's father and one of the appellant's children. Puente's father continued to make physical threats to the appellant's family. (IV RR at 181).

Ana Puenta ("Ana") also testified for the State. Ana Puente is Maria Puente's sister. (IV RR at 191). Ana also watched the video distributed by law enforcement and identified the suspect as the appellant, Juan Flores. Ana testified she believed she could recognize the person on the video as the appellant because of his boots and clothing. (IV RR at 194). Ana also recognized the accent. (IV RR at 195).

When cross-examined, Ana testified that while she had been to the appellant's home around eight times, the appellant had only been home approximately half of those instances. (IV RR at 205). Of those times, she only interacted with him one time. (IV RR at 206). Ana was always aware of the tension between her family and the appellant and his family due to Puente living with the appellant. (IV RR at 208).

Jennifer Ledezma ("Ledezma") also testified for the State. Ledezma is a cousin to Ana and Marie Puente. (IV RR at 213). Ledezma watched the video with her cousins and recognized the suspect as the appellant, Juan Flores. She had been to the appellant's home. (IV RR at 215). She believed the body type of the person on the video was similar to that of the appellant. She also believed the accent on the video to the be the same as that of the appellant. (IV RR at 220).

Kyle Mackay ("Mackay") served as the investigator of this robbery for the

Denison Police Department. (V RR at 7). Mackay was assigned to investigate this case the morning following the incident: September 5, 2017. (V RR at 10). Mackay obtained the security video from the convenience store where the offense occurred. (V RR at 11). He created a media release for the video in an attempt to obtain the identity of the suspect. (V RR at 12). Mackay received a voice mail response to his media release on September 7, 2017. (V RR at 15). The caller was a female stating that she knew who the suspect was leaving a number to return her call. Mackay returned the call and the caller identified herself as Maria Puente. (V RR at 17). Puente identified the suspect as Juan Flores. She provided Mackay with the appellant's home address. (V RR at 18).

Based on the statement provided by Puente, Mackay went to the appellant's home. (V RR at 19). When he arrived at the residence, he observed what he believed to be the suspect vehicle in the driveway. (V RR at 20). Mackay spoke with the appellant's wife at his home. The appellant's wife informed Mackay that he was not at home. (V RR at 31). The appellant's wife told Mackay that the appellant had been sick and the family was in need of money. Mackay played the audio from the security video for her. (V RR at 35). Mackay testified she identified the voice as that of her husband, Juan Flores. (V RR at 36). Mackay asked for consent to search the vehicle—which was granted. He did not locate anything of evidentiary value in the vehicle. (V RR at 38).

Mackay made a subsequent trip to the appellant's residence on a later date. Mackay again spoke with the appellant's wife and she again advised the appellant was not home. (V RR at 40-41). When Mackay questioned whether she was being truthful, the appellant's wife invited him into the home to see if the appellant was present. (V RR

at 42). Inside the residence he observed a drill and sacks he believed to have been used in the robbery. (V RR at 45).

Mackay interviewed Maria Puente, Ana Puente, and Jennifer Ledezma at Sherman High School. (V RR at 56-57). He testified they all consistently identified the appellant as the person on the security video. (V RR at 59).

Juan Flores ("Flores"), the appellant's son, testified for the defense. Flores remembered the specific day of the offense because it was Labor Day and they had a cookout at their residence. The cookout went from 6:00 p.m. to around 10:00 p.m. (V RR at 99). Flores also had the opportunity to watch the security footage of the offense. It was his belief the person on the video was not the appellant. He believed this because the person on the video was much heavier than his father and much more mobile than his father. (V RR at 100).

Michele Syler ("Syler") also testified for the defense. Syler was neighbors with the appellant and had known him for 10 to 12 years. (V RR at 132-133). Syler had interacted with the appellant hundreds of times during that period. Syler had watched the security video and it was her opinion that the person on the video was not the appellant. She based this on the size of the person in the video, along with the fact that his voice did not sound similar to the appellant. (V RR at 133).

J.D. Syler ("J.D.") also testified for the defense. J.D. is Syler's husband and had also known the appellant for several years as his neighbor. He had interacted with the appellant a number of times during those years. (V RR at 138). J.D. had also watched the security video and opined it was not the appellant on the video. He was basing this

on the body size and the voice not sounding like that of the appellant. (V RR at 139).

Isabel Flores ("Isabel"), the appellant's wife, also testified. They had known each other for 35 to 40 years and had been married for 19 years. (V RR at 145). Isabel testified on September 4, 2017, they were having a cookout that began around 6:00 p.m. and ended around 11:30 p.m. (V RR at 147-148). The appellant was home during that event and did not leave. Isabel had observed the security video and did not believe that it was the appellant on the video. (V RR at 148). She did not believe the person on the video matched her husband's size, ability to bend down, or voice. (V RR at 149).

SUMMARY OF THE ARGUMENTS

Summary of Issue 1:

The evidence was insufficient for the jury to find the drill alleged in the indictment was a deadly weapon. The evidence did not show the drill was used in such a way that it was capable of causing death or serious bodily injury. The evidence was, therefore, legally insufficient to support the appellant's conviction for Aggravated Robbery.

Summary of Issue 2:

When properly inside of a residence, an officer may seize items without a warrant which are immediately recognizable as evidence. Because the items seized from the appellant's home were not immediately recognizable as evidence, the trial court erred in denying the appellant's motion to suppress the evidence.

APPELLANT'S FIRST POINT OF ERROR

Because the evidence is insufficient to show the appellant used or exhibited a deadly weapon, the evidence is legally insufficient to prove the appellant committed the offense of Aggravated Robbery.

UNDERLYING FACTS

The Appellant relies on the above summation of the facts.

ARGUMENT AND AUTHORITIES

1. Standard of Review

When reviewing the legal sufficiency of the evidence, the court should review all the evidence in the light most favorable to the verdict to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State,* 323 S.W.3d 893, 912 (Tex.Crim.App.2010) citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A court should examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury to "fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hutchinson v. State,* 424 S.W.3d 164, 170 (Tex.App-Texarkana 2014) citing *Hooper v. State,* 214 S.W.3d 9, 13 (Tex.Crim.App.2007).

2. Aggravated Robbery

The State had the burden to prove the Appellant "did then and there, while in the course of committing theft of property and with the intent to obtain or maintain control of said property, intentionally or knowingly threaten or place [victim] in fear of imminent bodily injury or death, and the defendant did then and there use or exhibit a deadly

weapon, to wit: a drill" (CR at 12). See also TEX. PENAL CODE § 29.03. A deadly weapon is "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything that in the matter of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(17).

a. The drill as a deadly weapon

A drill is not a firearm, nor is it manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury. TEX. PENAL CODE § 1.07(17)(A). Additionally, there is no evidence the drill in the present case was in any way adapted for the purpose of inflicting death or serious bodily injury. *Id.* The only evidence of adaptation or modification of the drill was a sack being placed over the drill, apparently for the purpose of making the victim believe the drill was a firearm. Therefore, for the evidence to be sufficient for the jury to find the drill to be a deadly weapon, it must show that in its use or intended use it was capable of causing death or serious bodily injury. TEX. PENAL CODE § 1.07 (17)(B).

b. The use of the drill was not capable of causing death or serious bodily injury

Objects that are not considered dangerous weapons may become so, depending on the manner in which they are used during the commission of the offense. *Thomas v. State*, 821 S.W.2d 616, 620 (Tex.Crim.App.1991). The victim testified she believed the object in the suspect's hand to be a firearm. (IV RR at 131). When asked by the prosecutor if she would still be afraid knowing it was a drill she responded that, "It can poke, he can

turn it on me." (IV RR at 133). On cross-examination, the victim testified that the suspect was pointing the drill at her like a gun. When asked specifically if he struck her with it or attempted strike her with it, she responded in the negative. (IV RR at 137). Mackay testified at trial, when asked how a drill could be a deadly weapon, that "you could use it as a blunt object. You hit somebody with it. You could stab somebody with it. You could drill them with it." (V RR at 49).

The possibility the drill could be used in a way that might cause death or serious bodily injury is not sufficient to show the drill was used in a way that could cause death or serious bodily injury. "Capacity is evaluated based on the circumstances that existed *at the time of the offense*." *Hernandez v. State*, 332 S.W.3d 664, 667 (Tex.App.-Texarkana 2010) citing *Drichas v. State*, 175 S.W.3d 795, 799 (Tex.Crim.App.2005) (emphasis added). That the drill *could* have been used to strike or puncture the victim is not the relevant consideration. In the way the drill *was* used, pointing it as if it were a firearm, it was not capable of causing death or serious bodily injury.[2] *Id.* There is no evidence on the record the suspect struck the victim with the drill, raised the drill in an attempt to strike the victim, or took any action beyond holding the drill as if it were a firearm.

Because a drill is not a firearm, or designed, made, or adapted for the purpose of inflicting death or serious bodily injury, and because in its use in the present case it was not capable of causing death or serious bodily injury, the evidence was legally insufficient to allow a jury to find the drill was a deadly weapon. *See Hernandez v.*

[2] Mackay testified it would have taken a further act beyond what the suspect was seein doing on the video in order for the drill to cause death or serious bodily injury. (V RR at 81).

State, 332 S.W.3d 664 (Tex.App.-Texarkana 2010) (evidence insufficient where a toy gun was used and the only evidence was that the defendant pointed the gun at victims but did not strike her or attempt to strike her); *Pena Cortez v. State*, 732 S.W.2d 713 (Tex.App. Corpus Christi-Edinburg 1987) (evidence insufficient where toy gun was used and manner of use was not capable of causing death or serious bodily injury). Because the evidence is insufficient for the jury to find the drill was a deadly weapon, the evidence is legally insufficient to support the appellant's conviction for the offense of Aggravated Robbery.

The judgment of the trial court should be reversed and a verdict of "not guilty" rendered.

APPELLANT'S SECOND POINT OF ERROR

The trial court erred in denying the appellant's Motion to Suppress Evidence after an illegal search of the appellant's home.

UNDERLYING FACTS

The Appellant relies on the above summation of the facts.

ARGUMENT AND AUTHORITIES

1. Standard of Review

A trial court's ruling on a motion to suppress evidence is reviewed under a bifurcated standard of review. *Amador v. State,* 221 S.W.2d 666, 673 (Tex.Crim.App.2007). In reviewing the trial court's decision, a court should not engage in its own in its own factual review. *Romero v. State,* 800 S.W.2d 539, 543 (Tex.Crim.App.1990). The trial judge is the sole trier of fact and judge of the credibility of the witnesses and the weight to be given their testimony. *Weide v. State,* 214 S.W.3d 17, 24-25 (Tex.Crim.App.2007). An appellate court should give almost total deference to the trial court's rulings on 1) questions of historical fact, even if the trial court's determination of those facts was not based on an evaluation of credibility and demeanor, and 2) application-of-law-to-fact questions that turn on an evaluation of credibility and demeanor. *Amador,* 221 S.W.2d at 673. *Montanez v. State,* 195 S.W.2d 101, 109 (Tex.Crim.App.2006). When application-of-law-to-fact questions do not turn on the credibility of witnesses, an appellate court should review do novo the trial court's rulings on those questions. *Amador,* 221 S.W.3d at 673; *Estrada v. State,* 154 S.W.3d 604, 607 (Tex.Crim.App.2005).

When reviewing the trial court's ruling on a motion to suppress, the court must view the evidence in the light most favorable to the ruling. *Weide,* 214 S.W.3d at 24. *State v. Kelly,* 204 S.W.3d 808, 818 (Tex.Crim.App.2006). When the trial court makes explicit fact findings, the court shall determine whether the evidence, when viewed in the light most favorable to the trial court's rulings, supports those fact findings. *Kelly,* 204 S.W.3d at 8181-19. The court must uphold the trial court's ruling if it's supported by the record and correct under any theory of law applicable to the case even if the trial court gave the wrong reason for its ruling. *State v. Stevens,* 235 S.W.3d 736, 740, (Tex.Crim.App.2007).

2. The search of appellant's home exceeded the scope of the consent

The United States and Texas constitutions protect against unreasonable searches by government officials. U.S. Const. amend. IV; Tex. Const. art. I, § 9. Once a defendant shows that a search occurred without a warrant, the burden shifts to the State to prove that the search was reasonable under the totality of the circumstances. *Amador,* 221 S.W.3d at 672-73; *Torres v. State,* 182 S.W.3d 899, 902 (Tex.Crim.App.2005).

When inside of a residence, officers may seize evidentiary items found in plain view in the following requirements are met: (1) the initial intrusion was proper, or the police had a right to be where they were when the discovery was made; and (2) it was immediately apparent to the police that they had evidence before them. *Beaver v. State,* 106 S.W.3d 243, 249 (Tex.App. – Houston [1st Dist.] 2003) citing *Green v. State,* 866 S.W.2d 701, 704 (Tex.App.-Houston [1st Dist.] 1993).

a. The initial intrusion

The appellant had become a suspect in a robbery. Mackay went to the appellant's house to investigate the offense and to attempt to speak with the appellant regarding the allegations. After asking the appellant's wife several times if the appellant was home, she responded by inviting him into the home for the purpose of looking for the appellant. (III RR at 8-9).

The officer was properly in the premises as a result of the appellant's wife invitation to confirm the appellant was not at the home. Consent to "look around," however does not constitute consent to search the premises. *Cole v. State*, 484 S.W.2d 779, 783 (Tex.Crim.App.1972).

b. Immediately apparent evidence

Officers who have been invited onto premises may seize contraband discovered in plain view if the initial intrusion is proper and if the officer immediately recognizes the item as evidence. *Albert v. State,* 495 S.W.2d 236, 237 (Tex.Crim.App.1973). In the present case, Mackay was in the home at the invitation of the appellant's wife to look to see if the appellant was in the home. While looking through the home, Mackay observed a drill in what he was told was the bedroom of the appellant's son. He testified he believed it was possible the drill was used in the robbery. (III RR at 11). He observed a sack in the floor of the bedroom and another sack in the floor of the open closet in the same room. He likewise believed it was possible the sacks were used in the robbery. (III RR at 11-12). Mackay seized the items from the home without a warrant and took them back to the police department. Once at the police department he placed the sacks over

the drill to compare to the video of the offense and observed there would have to have been another piece attached to the drill. (III RR at 12).

The items to be seized in the present case—the drill and sacks—could not have been seized without a warrant because it would not have been immediately apparent Mackay had evidence before him. *Id.* The suspect in the present case committed the offense with what officers believed was a drill covered with a sack. When Mackey observed a drill and sacks in the residence he believed, as he testified under direct examination, it was possible the items were used to commit the offense.[3] He took the seized items back to the police department for the purpose of placing the sacks on the drill to compare it to the video. It was Mackay's believe that what he observed constituted evidence and he wanted to investigate the possibility further. It was not however, immediately apparent the items constituted evidence—as would obvious contraband such as controlled substances, drug paraphernalia, or firearms. Because it was not immediately apparent the items constituted evidence their seizure without a warrant was unlawful.

3. The error was not harmless

When an appellate court determines that the trial court erred in failing to suppress evidence, the court must then consider whether the error harmed the appellant. *State v. Daugherty,* 931 S.W.2d 268, 273 (Tex.Crim.App.1996). Because the illegal arrest and subsequent search violated the Appellants 4th Amendment rights, this court must reverse the trial court's judgment unless it determines beyond a reasonable doubt that the error

[3] At times, Mackay seemed to assert, as a matter of fact, he knew the drill and sacks were used to commit the offense. At other times, even under cross-examination by the prosecutor, he testified he recognized it being "potentially" evidence in the case. (III RR at 15).

did not contribute to the conviction or punishment. Tex. R. App. Proc. 44.2(a); *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex.Crim.App.2001). If the error has more than a "slight effect," it is not, beyond a reasonable doubt, harmless. *Phillips v. State*, 193 S.W.3d 904, 901 (Tex.Crim.App.2006). In conducting a review the court should evaluate the entire record in a neutral, impartial, and even-handed manner, not in the light most favorable to the prosecution. *Harris v. State*, 790 S.W.2d 568, 586 (Tex.Crim.App.1989).

The failure of the trial court to suppress the evidence which resulted from the illegal search of the Appellant's residence had more than a "slight effect." The evidence in this case consisted largely of several individuals who identified the appellant on a security video. Because the suspect's face was covered on the video, the witnesses identified the appellant based clothing type, voice, and height and weight. Aside from the suspect vehicle being similar to a vehicle driven by the appellant's wife, there was very little physical evidence connecting the appellant to the offense. The prosecutor emphasized the drill being located in the appellant's home consistently throughout the trial. The presence of the drill and the sacks in the appellant's home likely contributed heavily to the jury's verdict. Because it was physical evidence—and there was a scant amount of physical evidence in the case—the error had more than a slight effect.

The judgment of the trial court should be reversed and the case remanded.

PRAYER

WHEREFORE, the Appellant prays that this court reverse the conviction of the trial court and render a verdict of not guilty. In the alternative the Appellant prays this court reverse the conviction of the trial court and remand this case for a new trial or any other relief this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 3rd day of June, 2019 a copy of the Appellant's brief was delivered to the Grayson County District Attorney's Office.

\s\ Jeromie Oney
JEROMIE ONEY

CERTIFICATE OF COMPLAIANCE

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 4,525 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

\s\ Jeromie Oney
JEROMIE ONEY